87-481

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1987

JAMES H. LYONS,
Petitioner,

vs.

HONORABLE JAMES W. JACKSON, JUDGE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTION PRESENTED

Whether the Double Jeopardy Clause prohibits a second trial where the first jury is discharged as "genuinely deadlocked" three hours after it has reached an agreement, and the trial judge has made no inquiry of the jurors regarding their previous "agreement" or the possibility of reaching a verdict.

PARTIES

The petitioner here is James Lyons. The respondent is the Honorable James W. Jackson, a duly elected and sitting Common Pleas Court Judge who presided at the trial and would conduct a retrial.

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No.

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For the Sixth Circuit

DECISIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is unreported and is attached in the appendix (A1). The decision of the United States District Court for the Northern District of Ohio is unreported and is attached in the appendix (A9). The report of the magistrate is attached in the appendix (A11).[1]

1. Another written decision in this same case was issued by the Ohio Court of Appeals, Eleventh District during the direct appeal through the state court system. While that decision was probably not from a "court below" as that term is used in Sup. Ct. Rule 21.1(e), it was reprinted in the appendix to petitioner's first petition, Case No. 84-1472, October Term, 1984.

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was entered on June 19, 1987. Jurisdiction is conferred by 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

James Lyons was tried before a jury in the Common Pleas Court of Lake County, Ohio, for two counts of involuntary manslaughter of the same person. The prosecutor claimed in the first count that the petitioner caused the death of the victim as a proximate result of his committing felonious assault. (The felonious assault was alleged to have occurred against another person, not the decedent.)

The second count claimed that the death occurred as a proximate result of the petitioner menacing the other person rather than feloniously assaulting him. The first count was a felony of the first degree, Ohio Revised Code 2903.04(A), and the second count was a felony of the third degree, Revised Code 2903.04(B). In other words, the case at trial involved the claimed conduct of the petitioner toward a third person which was the proximate cause of the accidental death of the decedent who was a bystander.

The jury was discharged without having returned a verdict.

The following relevant facts were found by the Magistrate and adopted by the District Court:

> The following events are relevant. Trial commenced June 4, 1984, a Monday, and continued to Thursday afternoon. The jury deliberated approximately one hour that afternoon, then was dismissed for the day and returned Friday morning.
>
> Late Friday afternoon the court inquired, through the bailiff, of the status of the deliberations. The jury responded they had reached a verdict on Count I but could not agree on Count II. The provisional verdict on Count I was never reduced to writing.
>
> After consulting with the parties the court gave further jury instructions, specifically, a modified *Allen* charge, which stressed they should attempt to decide the entire case and should continue deliberating as long as there was a possibility of reaching a verdict.
>
> The jury deliberated at least another hour thereafter. The court then decided, with petitioner's agreement, but over the prosecutor's objection, to send the jury home for the weekend.

The jury resumed deliberations Monday morning and continued until just before noon. They then sent the court a note stating: "We can't agree on either account (sic)." The court had an in-chambers meeting with counsel where the following discussion occurred (petitioner's exhibit, hereafter PX B, pp. 2, 5):

The Court: Let the record reflect that after, in this Court's records, 13 and a half hours over three days, the Jury has indicated to the Court, the question to the Court, which will be attached and made a part of the record as an exhibit, they cannot come to an agreement.

Counsel have agreed in this consideration with the Court, is that correct, Mr. Purola, that they are hung at this point?

Mr. Purola: Attaching no particular significances (sic) to this, I concur.

Mr. Hawkins: Yes, sir.

The jury was called into open court where the following colloquy transpired (PX C at 2):

The Court: Mr. Ness, you have advised the Court that you are not able to reach an agreement on either count?

The Foreman: Yes, sir.

The Court: Ladies and gentlemen, you have considered this case for a considerable length of time and reported to the Court that you are unable to reach a verdict.

The Court accepts this conclusion and the foreman of the Jury agrees.

> The Prosecutor will present an entry on their finding.
>
> Members of the Jury, you are now excused. You may leave.

Magistrate's Report and Recommendation, A11.

After the discharge of the jury the petitioner moved the trial court for an order dismissing the indictment on double jeopardy grounds because the first jury had been improperly dismissed. That motion and one to reconsider that motion were denied.

Mr. Lyons then filed an interlocutory appeal to the Ohio Court of Appeals which affirmed the trial court's refusal to dismiss the case (actually to prohibit retrial).

The Supreme Court of Ohio denied discretionary review as did the Supreme Court of the United States. *Lyons v. Ohio,* 471 U.S. 1101.

The petitioner then filed a petition for habeas corpus in the United States District Court for the Northern District of Ohio challenging a future retrial on the grounds that it would violate his rights under the Double Jeopardy Clause. That court denied relief but found that Lyons had exhausted his state remedies and that he had not consented to the discharge of the jury. These two factual findings were never appealed by the respondent (A9).

The respondent did not object to a stay of state court proceedings during the period of the District Court's consideration of the petition.

The petitioner then filed an appeal to the Sixth Circuit from the District Court's denial of the writ. That

Court denied relief and affirmed the District Court on June 19, 1987.

The indictment is set for trial in November, 1987, but certainly would be stayed by consent pending this Court's decision on this petition.

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

This case involves the least litigated protection afforded by the Double Jeopardy Clause of the Fifth Amendment: the defendant's "valued right to have his case decided by the first jury impaneled." *Wade v. Hunter*, 336 U.S. 684.

While the amount of litigation spawned by the three more common elements of double jeopardy protection, i.e., no second prosecution after conviction, no second prosecution after acquittal, not more than one punishment for the same offense, *North Carolina v. Pearce*, 395 U.S. 711, 717, has mushroomed in recent years, there have been very few cases, and none at this level, identifying when a defendant's "valued right" must give way.

This case presents important and as yet unresolved questions regarding how any trial judge, state or federal, should decide if a jury is, in fact, genuinely deadlocked. As the Sixth Circuit below observed, a trial judge is torn between holding a jury too long and later being challenged for being coercive and dismissing the jury only to be faced with jeopardy claims.

While the Sixth Circuit identified the proper dilemma, it fell easily into the wrong conclusion. Eschewing

hindsight and giving "great deference" will virtually guarantee that a defendant in such a situation will have his fate (i.e., jury) decided as much by accident as any other factor.

The solicitude for trial judges expressed by the Court below finds its basis in *Arizona v. Washington,* 434 U.S. 497 (1978) where this Court wrote that "[t]he trial judge's decision to declare a mistrial when he considers the jury deadlocked is . . . accorded great deference by a reviewing court." *Id.* at 510.

But by failing to provide any guidelines for the exercise of discretion in such a situation, *Arizona v. Washington* leaves everyone in the dark as to whether it was properly exercised. The mere fact that the trial judge *was there* could not help him know, without inquiry, whether a verdict is possible. This was so because the trial judge would not know any division of the jury or anything but empirical fact that everyone would know, e.g., how long the jury was deliberating, the length of the trial, etc. All of those factors commonly lend themselves to more than one interpretation.

The one requirement that is missing and is long overdue as a matter of federal constitutional law is for the trial judge *to ask* each juror, individually, if he or she believes there is any possibility of reaching a verdict before discharging the jury as genuinely deadlocked.

Individual questioning of the jurors can easily be done without disruption and with a small investment in time. Indeed, in this case individual questioning might have taken 30 minutes and would almost certainly have saved three years of legal proceedings and thousands of dollars of everyone's money.

Somehow it has developed that the Court may receive the jury's communication that it cannot reach a verdict but that any detailed dialogue is dangerous. But private inquiries of jurors are frequently undertaken in trial settings with counsel and the court. For example, voir dire before trial that touches on an intensely personal subject is often done outside the presence of other jurors or in chambers.

Similarly jurors frequently report potential intrusions or overhearing somebody talking about the case they are trying. Those jurors are brought in with counsel for the parties and asked what they heard and what effect, if any, it had on them.

There is no difference between this kind of communication and asking a juror who is a member of a deliberating jury if there is any possibility that this jury could return a verdict.

The deference accorded a trial court's decision to abort a trial would be significantly enhanced if the trial judge had previously ascertained from the jurors, individually, that each felt that there was no possibility of a verdict being returned.

Particularized questioning is important for non-obvious reasons. In a case where the vote is 11 to 1 and has been for a long period of time (facts that would not and should not be known by the judge), the foreman may say "we cannot agree" but another member of the 11 man majority, who has no intention of changing his vote, may well say there is a possibility of reaching a verdict based on his own analysis of "minor" shifts in the arguments of the lone hold-out. In order to protect the defendant's "valued right" the trial court is constitutionally bound to engage

in that careful dialogue with the jury before discharging it.

There is considerable conflict and uncertainty among the circuits on the proper standard for determining when, or if, a jury is genuinely deadlocked.

In *United States v. Horn*, 583 F.2d 1124 (10th Cir. 1982), the court observed that the question was "not the present inability of the jury to agree, but whether agreement is *possible*." *Id.* at 1127. *Horn* mandates that the judge ascertain from all jurors if there is a possibility of reaching a verdict. *Id.* The Ninth Circuit in *United States v. See*, 505 F.2d 845 at 851 (9th Cir. 1974), specifically said that "[m]erely questioning the foreman may not be sufficient, but this Circuit has recently held questioning the foreman individually *and* the jury either individually or as a group is satisfactory." (Emphasis original). "Upon receiving a communication from the jury stating that agreement cannot be reached, the judge *must* question the jury *independently* whether further deliberations might overcome the deadlock." (Emphasis added). *United States v. Cawley*, 630 F.2d 1345, 1349 (9th Cir. 1980); *United States v. Nelson*, 599 F.2d 714 (5th Cir. 1979); *Arnold v. McCarthy*, 566 F.2d 1377, 1387 (9th Cir. 1978); *Brown v. Hughes*, 485 F. Supp. 793, 796 (D.Az. 1980). Such questioning will ensure that jurors reluctant to voice their opinion in open court will have an opportunity to state their belief that a verdict is possible. *See e.g., Brown*, 485 F. Supp. at 797.

What those courts mean by "questioning the jury" is obvious. The Court must ask if there is any possibility that further deliberations might result in a verdict. Rather, it is crucial that the court determine whether it is the jury's collective opinion that further deliberations will not

result in a verdict. *Cawley,* at 1349; *McCarthy,* at 1387; *Brown,* at 796. A jury's collective opinion, which can be fairly ascertained by individual questioning, means more than just the foreman's. *Brown,* at 796.

Cases like *United States v. Glover,* 731 F.2d 41 (D.C. Cir. 1984), show the large differences in the way juries in this situation are handled. The D.C. Circuit's reference to *United States v. Lansdown,* 460 F.2d 164 (4th Cir. 1972), *United States v. Gordy,* 526 F.2d 631 (5th Cir. 1976), *United States ex rel. Webb v. Court of Common Pleas,* 516 F.2d 1034 (3d Cir. 1975), suggests that wide variances exist in the handling of these situations. *Glover, id.* fn. 11.

The Sixth Circuit's failure in *United States v. Larry,* 536 F.2d 1149, and *Jones v. Hogg,* 732 F.2d 53 (6th Cir. 1984) and the instant case to require individual questioning before a proper mistrial can be declared runs contrary to the Ninth Circuit's holding in *United States v. Cawley, supra,* and the Tenth Circuit's decision in *United States v. Horn, supra.*

Even if there is some way some of the circuit court decisions on this subject could be reconciled, there remains great uncertainty in the area and a very great deal of *ad hoc* decision making.

It makes no sense for this frequently occurring application of the Double Jeopardy Clause to operate on so little authoritative decisional law while the other protections of the Double Jeopardy Clause, which probably occur less frequently nationwide, are the subject of so much.

In no case could the need for individualized questioning be more obvious, or urgent, than this one. Three hours after having told the trial judge that an agreement had been reached, the jury was discharged without a single

question being asked of them, or of the foreman, if there was a possibility of reaching a verdict.

Incredibly and inexplicably the trial judge never said to the jury "you told us Friday you had an agreement on one count, is there a possibility further deliberations might result in a verdict on at least one count of the indictment?". The trial court ignored the recent agreement.

Of course the importance of that agreement is that a trial judge is not required to believe or accept the jury's statement that it is hopelessly deadlocked. A trial judge in this situation could well have thought that an "agreement" only three hours old could not have dissipated so quickly. Individual questioning of the jurors could have helped him in this regard.

The trial court in this case asked the jury while they were deliberating on Friday how it was progressing (Appendix to Petition A19). It was at this time that the first fact event relevant to this decision took place. The jury told the judge that it had an agreement on one count but not on the other. *Id.* Instead of telling the jury to return the "agreement," the judge told the jury, with some emphasis, to deliberate more. This was referred to in the District Court as a "modified *Allen* charge." (A17).

After a recess for the weekend, the jury deliberated two and three-fourths hours more on Monday and then wrote a note saying it could not come to an agreement on either count (A19). The court met with counsel and expressed its view that the jury was hung. *Id.*

Upon bringing the jury into court the judge made a statement more like a rhetorical question: "Mr. Ness, you have advised this Court that you are not able to reach an agreement on either count?" (Jury Discharge Proceed-

ing Transcript, A21). It certainly was not clear from that statement whether the judge was asking for confirmation that the jury could not agree on a verdict or whether he was asking for confirmation that the jury had sent a note.

The court then made another statement that was factually wrong at least in part: ". . . and reported to the Court that you are unable to reach a verdict." *Id.* The jury's note did not say it was "unable to reach a verdict," which would not have been sufficient to allow a mistrial, but said the jury was "unable to agree on either count."

The jury's statement and the judge's characterization of it did not even *address* the possibility of reaching a verdict; only current observations and assumptions were included in the communication with the jury.

The judge also commented that "you have considered this case for a considerable length of time" in the same sentence that he noted the jury reported it could not reach a verdict (A21). While this observation about time may be accurate in a larger sense, it is misleading in this case. The jury only considered the case for two and three-fourths hours since it had told the court it had an agreement on one count.

Lastly, the trial judge made another erroneous assumption, namely that the jury said it was unable to reach a verdict: "The court accepts this conclusion and the foreman of the Jury agrees." *Id.*

The jury's simple statement that it "cannot agree on either account (sic)" manifestly was *not* a conclusion that it was unable to reach a verdict, yet the trial judge made that leap without a moment's hesitation. A state-

ment that can only be viewed as a report of its present condition ("we cannot agree on either . . .") is simply not the same as saying it would not be able to, or could not reach a verdict. To add that the foreman agrees is gratuitous and not automatically accurate since, as noted above, the foreman's cryptic "Yes, sir" is subject to two quite distinct interpretations.

As this factual background shows, at no time did the trial judge ever specifically ask the jury or the foreman if a verdict could be reached; it merely assumed that present conditions would continue into the future.

While this failure is fatal to the trial court's conclusion because every court has held that the trial judge must "find out from the jury" if a verdict is possible or, put another way, if it is genuinely deadlocked, it is doubly so here because the trial court, by its disposition, affirmatively ignored the effect of the "agreement" the jury had said it had only two and three-fourths hours earlier on Friday afternoon.

There is a vast difference between being "unable to reach an agreement" and being "hopelessly deadlocked" and somewhere between the two lies the petitioner's constitutional right to be free from further prosecution. The trial judge never sought or received anywhere near an unequivocal indication that the jury was hopelessly deadlocked. Neither did he deal with the practical and constitutional effect of the recent agreement on the question of whether the jury was hopelessly deadlocked Monday. If inability to reach an agreement bears on the question of whether any jury is "hung," surely actually having reached an agreement must carry critical weight in the other direction, especially after such a short time.

The question presented here has national application every day, and the facts of this case provide an excellent vehicle for establishing long overdue standards for this application of the Double Jeopardy Clause.

Respectfully submitted,

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed June 19, 1987)

[NOT RECOMMENDED FOR FULL-TEXT PUBLICATION]

No. 86-3962

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES H. LYONS,
Petitioner-Appellant,

v.

HONORABLE JAMES W. JACKSON, Common Pleas Court, Lake County, Ohio,
Respondent-Appellee.

On Appeal from the United States District Court for the Northern District of Ohio.

Before: GUY and BOGGS, *Circuit Judges;* and EDWARDS, *Senior Circuit Judge.*

PER CURIAM. Lyons appeals from the denial of his petition for a writ of habeas corpus. The sole issue presented by Lyons' habeas petition concerned whether the double jeopardy provisions of the Constitution were implicated as a result of a mistrial declared in a criminal proceeding in which he was a defendant. The mistrial was the result of a hung jury in a state criminal prose-

cution. The district court concluded that the granting of the mistrial in the state court was appropriate and denied the writ. We agree and affirm.

I.

Lyons was tried in the Common Pleas Court of Lake County, Ohio, for involuntary manslaughter. The prosecution involved two counts. Each count embodied a different theory. The prosecution claimed in the first count that the death of the victim was the proximate result of Lyons' felonious assault on a third party. The second count claimed that the victim's death occurred as a result of Lyons "menacing" the third party rather than feloniously assaulting him. The first count was an Ohio first degree felony and the second count was a felony of the third degree.

The relevant events at trial were described by the magistrate below as follows:

> Trial commenced June 4, 1984, a Monday, and continued to Thursday afternoon. The jury deliberated approximately one hour that afternoon, then was dismissed for the day and returned Friday morning.
>
> Late Friday afternoon the court inquired, through the bailiff, of the status of the deliberations. The jury responded they had reached a verdict on Count I but could not agree on Count II. The provisional verdict on Count I was never reduced to writing.
>
> After consulting with the parties the court gave further jury instructions, specifically, a modified *Allen* charge, which stressed they should attempt to decide the entire case and should continue deliberating as long as there was a possibility of reaching a verdict.

The jury deliberated at least another hour thereafter. The court then decided, with petitioner's agreement, but over the prosecutor's objection, to send the jury home for the weekend.

The jury resumed deliberations Monday morning and continued until just before noon. They then sent the court a note stating. "We can't agree on either account (sic)." The court had an in-chambers meeting with counsel where the following discussion occured:

> The Court: Let the record reflect that after, in this Court's records, 13 and a half hours over three days, the Jury has indicated to the Court, the question for the Court, which will be attached and made a part of the record as an exhibit, they cannot come to an agreement.
>
> Counsel have agreed in this consideration with the Court, is that correct, Mr. Purola, that they are hung at this point?
>
> Mr. Purola: Attaching no particular significances (sic) to this, I concur.
>
> Mr. Hawkins: Yes, sir.
>
> The jury was called into open court where the following colloquy transpired:
>
> The Court: Mr. Ness, you have advised the Court that you are not able to reach an agreement on either count?
>
> The Foreman: Yes, sir.
>
> The Court: Ladies and gentlemen, you have considered this case for a considerable length of time and reported to the Court that you are unable to reach a verdict.

> The Court accepts this conclusion and the foreman of the Jury agrees.
>
> The Prosecutor will present an entry on their finding.
>
> Members of the Jury, you are now excused. You may leave.

App. 13-15.

II.

The Constitution directs that no person shall be twice put in jeopardy of life or limb for the same offense. However, as we stated in *Jones v. Hogg*, 732 F.2d 53 (6th Cir. 1984):

> The double jeopardy clause is not an absolute bar to retrial in every case. A defendant may be retried where a "manifest necessity" exists to declare a mistrial in his initial prosecution. A deadlocked jury is a classic example of manifest necessity.

Id. at 54 (citations omitted). The courts have uniformly held that "the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial." *Arizona v. Washington*, 434 U.S. 497, 509 (1978).

Thus, in the purest sense, our inquiry is whether there was a genuinely deadlocked jury here. In terms of habeas review, however, this inquiry translates into answering the question as to whether the trial judge failed to exercise the "sound discretion" entrusted to him. 434 U.S. at 510 n.28. In reviewing this exercise of "sound discretion" we do so against the command of *Arizona v. Washington* that "[t]he trial judge's decision to declare a mistrial when he considers the jury deadlocked is . . . accorded great deference by a reviewing court." *Id.* at 510.

We are also guided in this inquiry by our decision in *Hogg* where the court stated:

> In determining whether sound discretion has been exercised, several factors must be considered. These factors include: (1) a timely objection by the defendant; (2) the jury's collective opinion that it cannot agree on a verdict; (3) the length of the jury deliberations; (4) the length of the trial; (5) the complexity of the issues presented to the jury; (6) any proper communication the judge has with the jury; (7) the effects of possible exhaustion and the impact which coercion of further deliberations might have on the verdict; and (8) the trial judge's belief that additional prosecutions will result in continued hung juries.

Hogg, 732 F.2d at 56. Although the *Hogg* guidelines are helpful, they are illustrative rather than all inclusive. Additionally, the particular facts of each individual case must be considered and will dictate which of the *Hogg* factors, if any, should be accorded greater weight.

Applying the *Hogg* guidelines, we find the following facts support the conclusion that the trial judge properly exercised his discretion: (1) this was only a three and one-half day trial; (2) the issues were not complex; (3) the jury deliberated for thirteen and one-half hours over a three-day period; (4) the jury had been given a modified *Allen* charge; (5) petitioner did not object to the *Allen* charge; (6) petitioner's counsel agreed with the court that the jury was hung.

Although the court accepted the foreperson's assurance that the jury was hung and did not individually question each juror, this procedure is acceptable under these facts. *United States v. Larry*, 536 F.2d 1149, 1153 (6th Cir. 1976), *cert. denied*, 429 U.S. 984 (1976).

The fact that the jury had been given a modified *Allen* charge is also of particular significance. We agree with the magistrate's observations on this issue:

> The judge gave a modified *Allen* charge on Friday. The jury was instructed in part:
>
> > If you decide that you cannot agree and that further deliberations will serve no useful purpose, you may ask to be returned to the courtroom and report that fact to the Court. If there is a possibility of reaching a verdict, you should continue your deliberations.
>
> The clear import of these instructions was to inform the jury not to return to court without a verdict unless it was hopelessly deadlocked. Thus when the jury did return on Monday without a verdict and told the court it could not agree on either count, detailed inquiry was not necessary. The inquiry on Monday was similar to that in other cases following a previous *Allen* charge which found no double jeopardy violation. *Rogers v. United States*, 609 F.2d 1315 (9th Cir. 1979); *Henderson v. Wright*, 533 F. Supp. 1373 (D. Me. 1982).

App. 19.

Finally, we also attach significance to the fact that there is nothing in the record to indicate that the trial judge was motivated to declare a mistrial for reasons other than the interests of justice. This distinguishes the instant case from cases such as *United States v. Gordy*, 526 F.2d 631 (5th Cir. 1976), where the appeals court concluded that the declaration of a mistrial after a jury had deliberated only five and one-half hours was motivated at least in part by the trial judge's desire to not miss his airplane flight home.

The life of a trial judge is not an easy one. If a jury is held after they indicate an inability to reach a verdict, the judge is accused of being "coercive." If the judge dismisses the jury and grants a mistrial, the trial judge is then faced with acquittal motions based on double jeopardy. Notwithstanding this dilemma, there is no doubt that an experienced trial judge has the best vantage point to determine whether further jury deliberations would be appropriate. Although with hindsight there is always more that could have been done, we find here that the judge's declaration of a mistrial was an appropriate response to the jury's conclusion that they could not agree.

AFFIRMED.

JUDGMENT ENTRY OF THE UNITED STATES DISTRICT COURT

(Filed September 30, 1986)

Case No. C85-2421

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JAMES H. LYONS,
Petitioner,

vs.

THE HONOBALE JAMES W. JACKSON,
Respondent.

JUDGMENT ENTRY

Upon consideration, this Court having filed its memorandum of opinion and order denying petitioner's application, pursuant to 28 U.S.C. § 2254 for writ of habeas corpus,

IT IS ORDERED that the petition is hereby dismissed.

/s/ ALVIN I. KRENZLER
United States District Judge

MEMORANDUM AND OPINION OF THE UNITED STATES DISTRICT COURT

(Filed September 30, 1986)

Case No. C85-2421

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JAMES H. LYONS,
Petitioner,

vs.

THE HONORABLE JAMES W. JACKSON,
Respondent.

MEMORANDUM OF OPINION AND ORDER DENYING WRIT OF HABEAS CORPUS

Petitioner has filed a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner was earlier tried in state court on two counts of involuntary manslaughter. The trial court found that the jury was deadlocked, and declared a mistrial and ordered a retrial. The petitioner alleges that the retrial ordered by the trial court judge will place him in jeopardy a second time in violation of his Fifth Amendment rights.

Pursuant to L. Civ. R. 19.05, this case was referred to a Magistrate for a report and recommended decision. The Magistrate filed his Report and Recommended Decision with the Court. In his Report, the Magistrate concluded, from the evidence of record, that the state court properly declared a mistrial and ordered a retrial.

The petitioner has filed objections to the Magistrate's Report. The petitioner asserts that the trial judge did

not exercise proper discretion in discharging the jury but should have instead engaged in more personal questioning of the jury to determine if they were "genuinely deadlocked" and why they were unable to reach an agreement on either count in light of the fact that they had previously reported to the trial judge that they had come to an agreement on Count 1. Petitioner further claims that the single inquiry to the foreman was inadequate.

Upon review of the record, the Magistrate's Report and Recommended Decision, the petitioner's objections, and the relevant facts and law in the case, the Court is in accord with the Magistrate's Report and Recommended Decision. The trial judge is not required to address each juror independently to determine if the jury is hopelessly deadlocked. Rather, inquiry to the foreman alone is acceptable. *United States v. Larry,* 536 F.2d 1149 (6th Cir. 1976); *United States v. See,* 505 F.2d 845 (9th Cir. 1975). The trial court exercised proper discretion in weighing and considering all the relevant factors to determine whether or not the jury was "hopelessly deadlocked." *Jones v. Hogg,* 732 F.2d 53 (6th Cir. 1984). This Court further concludes that the petitioner's failure to request a partial verdict prior to the declaration of a mistrial and his failure to object to the modified *Allen* charge constitute an acquiescence to the trial judge's actions and prevents the petitioner from now claiming the opposite.

Accordingly, the Magistrate's Report and Recommended Decision is hereby adopted and incorporated by reference. The writ of habeas corpus, pursuant to 28 U.S.C. § 2254, is denied.

IT IS SO ORDERED.

/s/ ALVIN I. KRENZLER
United States District Judge

REPORT AND RECOMMENDATION OF MAGISTRATE, UNITED STATES DISTRICT COURT

(Filed August 5, 1986)

No. C85-2421

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JAMES H. LYONS,
Petitioner,

v.

THE HONORABLE JAMES W. JACKSON,
Respondent.

REPORT AND RECOMMENDATION

STREEPY, *Mag.*

James Lyons has petitioned this court for habeas corpus relief pursuant to 28 U.S.C. §2254. Petitioner was tried before a jury in Lake County Common Pleas Court on an indictment charging him with two counts of involuntary manslaughter of the same person. After the jury had deliberated for several days the trial court found them deadlocked and declared a mistrial. The case was then scheduled to be retried. Petitioner claims a retrial will place him in jeopardy a second time in violation of his fifth amendment right against double jeopardy.

Petitioner filed post-trial motions seeking relief on various grounds, including double jeopardy. The motion

was denied. Petitioner sought reconsideration of the double jeopardy claim, which was again denied. He appealed, and the state appellate court affirmed. His appeal to the Ohio Supreme Court was dismissed for want of a substantial constitutional question. The United States Supreme Court denied an application for certiorari. There has been exhaustion of state remedies on the double jeopardy claim.

Petitioner seeks a federal writ of habeas corpus despite the fact he has not been convicted of any state crime. Considerations of federalism would normally preclude federal court from hearing his claim; however, under exceptional circumstances it is permitted. A double jeopardy claim such as petitioner's constitutes such an exception; thus, in view of the fact petitioner exhausted state remedies, this court has jurisdiction. *Gully v. Kunzman,* 592 F.2d 283 (6th Cir. 1979), *cert. denied,* 442 U.S. 924 (1979).

The following events are relevant. Trial commenced June 4, 1984, a Monday, and continued to Thursday afternoon. The jury deliberated approximately one hour that afternoon, then was dismissed for the day and returned Friday morning.

Late Friday afternoon the court inquired, through the bailiff, of the status of the deliberations. The jury responded they had reached a verdict on Count I but could not agree on Count II. The provisional verdict on Count I was never reduced to writing.

After consulting with the parties the court gave further jury instructions, specifically, a modified *Allen* charge, which stressed they should attempt to decide the entire case and should continue deliberating as long as there was a possibility of reaching a verdict.

The jury deliberated at least another hour thereafter. The court then decided, with petitioner's agreement, but over the prosecutor's objection, to send the jury home for the weekend.

The jury resumed deliberations Monday morning and continued until just before noon. They then sent the court a note stating: "We can't agree on either account." The court had an in-chambers meeting with counsel where the following discussion occurred (petitioner's exhibit, hereafter PX B, pp.2, 5):

> The Court: Let the record reflect that after, in this Court's records, 13 and a half hours over three days, the Jury has indicated to the Court, the question to the Court, which will be attached and made a part of the record as an exhibit, they cannot come to an agreement.
>
> Counsel have agreed in this consideration with the Court, is that correct, Mr. Purola, that they are hung at this point?
>
> Mr. Purola: Attaching no particular significances to this, I concur.
>
> Mr. Hawkins: Yes, sir.

The jury was called into open court where the following colloquy transpired (PX C at 2):

> The Court: Mr. Ness, you have advised the Court that you are not able to reach an agreement on either count?
>
> The Foreman: Yes, sir.
>
> The Court: Ladies and gentlemen, you have considered this case for a considerable length of time and reported to the Court that you are unable to reach a verdict.

The Court accepts this conclusion and the foreman of the Jury agrees.

The Prosecutor will present an entry on their finding.

Members of the Jury, you are now excused. You may leave.

The double jeopardy clause is not an absolute bar to successive trials. *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 309 (1984). To bar a retrial, jeopardy must first attach, then be terminated by some appropriate resolution of the case, *e.g.*, by an acquittal. *Id.* Jeopardy attached in this case when the jury was sworn in. *Richardson v. United States*, 468 U.S. 317, 325 (1984); *United States v. Jorn*, 400 U.S. 470, 479 (1971).

Courts may declare a mistrial and order a retrial without running afoul of the double jeopardy clause "whenever, in their opinion, there is a manifest necessity for the act." *United States v. Scott*, 437 U.S. 82, 93 (1978). When a judge finds a jury is genuinely deadlocked there is manifest necessity, thus jeopardy does not terminate. *Arizona v. Washington*, 434 U.S. 497, 509 (1978). On the other hand, if a mistrial was improperly declared, jeopardy terminated, and the double jeopardy clause bars a retrial. *See, e.g., Downum v. United States*, 372 U.S. 734 (1963); *Richardson, supra.*

To insure the rights of the accused are "adequately protected, reviewing courts have an obligation to satisfy themselves that . . . the trial judge exercised 'sound discretion' in declaring a mistrial." *Washington*, 434 U.S. at 514. In deciding a jury is genuinely deadlocked, a trial judge must properly balance the interests of both sides. *Jorn*, 400 U.S. at 485. These are the "defendant's 'valued right' to have his trial completed by the first jury chosen

to hear the case . . . [and] 'the public's interest in fair trials designed to end in just judgment.'" *United States v. Love*, 597 F.2d 81, 86 (6th Cir. 1979), *quoting Illinois v. Sommerville*, 410 U.S. 458, 470 (1972). When the mistrial is based upon the trial judge's finding that the jury is deadlocked "great deference should be accorded" that decision. The prosecution has the burden of proof that the mistrial was the result of manifest necessity. *Washington*, 434 U.S. at 505, 508; *Jones v. Hogg*, 732 F.2d 53, 56, 57 (6th Cir. 1984).

While manifest necessity requires a "high degree" of necessity, the standard cannot "be applied mechanically or without attention to the particular problems confronting the trial judge." *Washington*, 434 U.S. at 505-06. The Sixth Circuit has identified the relevant factors:

> In determining whether sound discretion has been exercised, several factors must be considered. These factors include: (1) a timely objection by the defendant; (2) the jury's collective opinion that it cannot agree on a verdict; (3) the length of the jury deliberations; (4) the length of the trial; (5) the complexity of the issues presented to the jury; (6) any proper communication the judge has with the jury; (7) the effects of possible exhaustion and the impact which coercion of further deliberations might have on the verdict; and (8) the trial judge's belief that additional prosecutions will result in continued hung juries.

Hogg, 732 F.2d at 56.

The timely objection factor must be considered in regard to events which occurred on two different days, Friday, see p. 9 [A18], *infra*, and Monday. The factor is not significant with references to Monday afternoon. Although petitioner had agreed in chambers that the jury was hung, he noted this was of little significance as the

jury had not yet been directly questioned. Upon declaring the mistrial the court did not ask if counsel wanted to be heard. These circumstances surrounding declaration of the mistrial do not constitute that positive sign of acquiescence by petitioner to the mistrial as is required in *Hogg*, 732 F.2d at 57.

There is no uniform minimum period during which a jury must deliberate before the court may declare a jury deadlocked. *Brown v. Hughes*, 483 F.Supp. 793, 797 (D. Ariz. 1980). Since each case varies and a cold record is difficult to gauge, the time needed for the jury to reach a verdict is often best left to the trial judge. *United States v. See*, 505 F.2d 845, 852, n.12 (9th Cir. 1974) (*"U.S. v. See"*), *cert. denied, Gordon v. United States*, 420 U.S. 492 (1975); *United States v. MacQueen*, 596 F.2d 76, 82 (2nd Cir. 1979). Petitioner's trial lasted approximately three and one-half days. He was charged with two counts of manslaughter. Neither party has suggested the issues were complex. The jury deliberated for thirteen and one-half hours over a three-day period. In *U.S. v. See* the court cited and relied in part on a 1966 study which found that for a 3-5 day trial the average jury reached a verdict in just under five hours or were hung after more than ten hours. This study reflects that the trial judge in the case *sub judice* acted reasonably in declaring a mistrial.

The primary dispute is whether there was adequate communication between the judge and jury. A "crucial factor" in determining the probability of reaching a verdict is a statement from the jury that it is "hopelessly deadlocked." *U.S. v. See*, 505 F.2d at 851. In petitioner's case the court had received a note from the jury stating: "We can't come to an agreement on either account." (PX B, p.4). Petitioner claims that the trial court failed thereafter to adequately question the jury to determine independently

whether further deliberations might overcome the deadlock. *See Arnold v. McCarthy,* 566 F.2d 1377, 1387 (9th Cir. 1978); *U.S. v. See,* 505 F.2d at 851-52; *United States v. Goldstein,* 479 F.2d 1061, 1068 (2nd Cir. 1973), *cert. denied,* 414 U.S. 873 (1973).

Failing to address each juror independently is not an abuse of discretion. Inquiry through the foreman, as occurred herein, is acceptable. *United States v. Larry,* 536 F.2d 1149 (6th Cir. 1976), *cert. denied, Larry v. United States,* 429 U.S. 984 (1976). Petitioner claims the judge did not engage in an adequate inquiry of the foreman. Under appropriate circumstances a fuller inquiry might be required, *see, e.g., U.S. v. See; United States ex rel. Webb v. Court of Common Pleas,* 516 F.2d 1034 (3d Cir. 1975); however, in the context of this case, particularly in light of the events of Friday afternoon, the questioning on Monday afternoon was adequate.

The judge gave a modified *Allen* charge on Friday. The jury was instructed in part (PX A, p.3):

> If you decide that you cannot agree and that further deliberations will serve no useful purpose, you may ask to be returned to the courtroom and report that fact to the Court. If there is a possibility of reaching a verdict, you should continue your deliberations.

The clear import of these instructions was to inform the jury not to return to court without a verdict unless it was hopelessly deadlocked. Thus when the jury did return on Monday with a verdict and told the court it could not agree on either count, detailed inquiry was not necessary. The inquiry on Monday was similar to that in other cases following a previous *Allen* charge which found no double jeopardy violation. *Rogers v. United States,* 609 F.2d

1315 (9th Cir. 1979); *Henderson v. Wright*, 533 F.Supp. 1373 (D.Me. 1982).

Petitioner now contends that the trial judge erred on Friday afternoon in some language of the modified *Allen* charge and by not ordering the jury to return a partial verdict on Count I. He failed to request a partial verdict on Friday, or at any time prior to declaration of the mistrial, and failed to make any objection to the charge or other relevant matter. He had every opportunity to do so since the jury deliberated another hour on Friday, after the charge was given, and for a few hours on Monday. Petitioner not only failed to object, he agreed with the judge on Friday that the jury should be dismissed for the weekend. This reflects the positive circumstances necessary to infer petitioner's acquiescence in the judge's actions on Friday. *See Hogg, supra*, at p.57. He cannot be heard to claim the opposite now.

RECOMMENDATION

It is recommended the petition be dismissed.

/s/ JACK B. STREEPY
United States Magistrate

TRANSCRIPT OF THE COURT OF COMMON PLEAS FINDINGS RE DISCHARGE OF THE JURY

[2] BE IT REMEMBERED, that heretofore, to-wit: On Thursday, the 16th day of August, 1984, being one of the regular days of said Court, before the Honorable James W. Jackson, the following proceedings were had:

The Court: This is the State of Ohio v. James Lyons, Case No. 83 CR 685. Present is Albert Purola, attorney for the Defendant with Stewart Savage. Mr. Judd Hawkins is present, attorney for the State, assistant prosecutor for Lake County.

On August 7, 1984, this Court denied Defendant's motion for acquittal and scheduled this case for trial for August 20, 1984, at 9:00 a.m., this Monday.

Subsequent to that defense counsel has requested a hearing before this Court to supplement his record of the briefs and trial record for his filing a notice of appeal as to the Court's ruling as previously stated.

Mr. Purola has requested the Court to ask the bailiff, the Court's bailiff, Mr. John Clair, to state on the record his recollection of what transpired [3] on June 8, 1984, when at approximately 4:00 o'clock in the afternoon the Court inquired of the Jury, or had the bailiff inquire of the Jury as to whether or not they were close to a verdict. Mr. Clair what did the Jury say?

Mr. John Clair: The Jury told me that they had reached a verdict as to count one of the indictment, and they were hung as to count two.

At this point I told them that I would relay the message to the Court, which I immediately did.

The Court: Did they indicate they had reduced that verdict in writing?

Mr. Clair: They specifically said that the verdict as to count one had not been reduced to writing.

The Court: Did they indicate to you, to your knowledge, what that verdict was on either count?

Mr. Clair: I don't recall them saying that, no.

The Court: At which [4] point the Court gave an additional instruction to the Jury to reconsider deliberations, which is all part of the record. And after that instruction which neither counsel had any additional instructions to give, and were satisfied with that instruction, the Jury deliberated until 6:30 p.m. and were recessed for the weekend.

The Jury came back in at 8:30 on June 11, 1984, and deliberated until 11:45 a.m., when they submitted this message to the Court. "We can't come to an agreement on either account." At which time counsel were called into Court and as the record states that the Court stated in open Court: "Let the record reflect that after, in this Court's records, 13 and a half hours over three days, the Jury has indicated to the Court, the question to the Court, which will be attached and made a part of the record as an exhibit, they cannot come to an agreement.

* * * * *

TRANSCRIPT OF COURT OF COMMON PLEAS DISCHARGING THE JURY

[2] BE IT REMEMBERED, that heretofore, to-wit: On Monday, June 11, 1984, this case having been presented to the Jury, and the Jury having been in deliberations, the following proceedings were had in open Court:

The Court: Mr. Ness, you have advised the Court that you are not able to reach an agreement on either count?

The Foreman: Yes, sir.

The Court: Ladies and gentlemen, you have considered this case for a considerable length of time and reported to the Court that you are unable to reach a verdict.

The Court accepts this conclusion and the foreman of the Jury agrees.

The Prosecutor will present an entry on their finding.

Members of the Jury, you are now excused. You may leave. After you are discharged you may discuss your verdict, or lack of obtaining a verdict, and your deliberation with others but you are not required to do so.

* * * * *

Supreme Court, U.S.
FILED
OCT 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-481

In the Supreme Court of the United States

October Term, 1987

JAMES H. LYONS,
Petitioner,

vs.

HONORABLE JAMES W. JACKSON, JUDGE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 87-481

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JAMES H. LYONS,
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TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To: The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There are no substantial federal questions involved which would require this Court to review this case.

The decision rendered by the United States Court of Appeals for the Sixth Circuit in this matter does not conflict with the decision of any other federal court of appeals on the same issue.

This Court has already once denied certiorari to the Lake County Court of Appeals in this matter, wherein petitioner raised virtually the same issues as are presently before the Court. *Lyons v. Ohio,* 471 U.S. 1101 (1985).

STATEMENT OF THE CASE

Respondent has no objection to the Statement of the Case as set forth by petitioner at pp. 2-6 of his Petition for Writ of Certiorari in the instant matter.

REASONS FOR DENYING CERTIORARI

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution does not prohibit a second trial where the first jury, having deliberated for nearly four (4) hours after receiving a modified Allen charge in which they were instructed to continue deliberating as long as there was a possibility of reaching a verdict, notifies the trial judge that they are unable to reach an agreement, and the trial judge, without questioning the jurors further, declares a mistrial and discharges the jury.

Defendant-Petitioner argues that the trial court's failure to thoroughly question the jury, either individually, as a group, or through their foreman, with regard to the possibility of reaching a verdict through further deliberations, before declaring the jury deadlocked and ordering a mistrial, was a violation of his constitutional rights. This argument is without merit, being supported by neither facts nor law.

It is well-settled that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution is not an absolute bar to retrial in every case, and that a defendant may be retried where a "manifest necessity", a classic example of which is a deadlocked jury, exists to declare a mistrial in his initial prosecution. *United States v. Perez,* 22 U.S. (9 Wheat) 579, 580 (1824); *Arizona v. Washington,* 434 U.S. 497, 505-506 (1978); *United States v. Sanford,* 429 U.S. 14, 16 (1976); *Jones v. Hogg,* 732 F.2d 53, 54 (6th Cir. 1984); *United States v. Brown,* 677 F.2d 1174, 1178 (6th Cir. 1980).

The standards for determining whether a mistrial is properly declared are found in *Arizona v. Washington, supra.* The Court in *Arizona* delineated two levels of scrutiny, based on the way that a mistrial can come about.

> [T]he strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused.

434 U.S. at 508.

The mistrial in the case at bar was not based on the unavailability of prosecution evidence, nor is there any evidence to suggest that the prosecutor is attempting to harass the defendant. Instead, the mistrial in this case clearly fits within the Court's second category, that is, "the mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict, long considered the classic basis for a proper mistrial." *Id.* at 509.

A much less stringent level of scrutiny is used in reviewing these types of mistrials. The *Arizona* Court stated that:

> In this situation there are especially compelling reasons for allowing the trial judge to exercise broad discretion in deciding whether or not 'manifest necessity' justifies a discharge of the jury. On the one hand, if he discharges the jury when further deliberations may produce a fair verdict the defendant is deprived of his 'valued right to have his trial completed by a particular tribunal.' *But if he failed to discharge a jury which is unable to reach a verdict after protracted and exhausting deliberations, there exists a significant risk that a verdict may result from the pressures inherent in the situation rather than the considered judgment of all jurors . . . the trial judge's decision to declare a mistrial when he considers the jury deadlocked is therefore accorded great deference by a reviewing court.*

(Emphasis supplied). *Id.* at 509-510.

Despite this standard of deference, petitioner urges this Court to find that the trial court was obligated to question each juror individually as to the possibility of their reaching a verdict. As the Court of Appeals correctly noted, however, the determination of whether a jury is genuinely deadlocked and a mistrial declaration necessary is a case by case determination, based on the totality of the circumstances involved in each case. *See United States v. Gordy*, 526 F.2d 631 (5th Cir. 1976); *Jones v. Hogg*, 732 F.2d 53, 55 (6th Cir. 1984); and cases cited therein.

> [T]he guiding principles of the *Perez* decision . . . command courts in considering whether a trial should be terminated without judgment to take 'all circumstances into account' and thereby forbid the mechanical application of an abstract formula.

United States v. See, 505 F.2d 845 (9th Cir. 1974) [quoting *Wade v. Hunter*, 336 U.S. 684, 691 (1949)].

The question then, in a habeas review such as the case at bar, becomes one of whether, under the circumstances of the particular case, the trial court abused its discretion in finding that a "manifest necessity" for the declaration of a mistrial existed at the time it was declared. In order to make such a determination, a reviewing court must consider a number of important factors. *See Arnold v. McCarthy*, 566 F.2d 1377 (9th Cir. 1978); *United States v. See, supra; Jones v. Hogg, supra.*

The Sixth Circuit Court of Appeals' opinion in *Jones v. Hogg, supra*, contains the most comprehensive, though not all-inclusive, judicial compilation of such factors, to date, and serves to illustrate the importance of considering the individual circumstances of each particular case before making such a determination. They include:

> (1) a timely objection by the defendant; (2) the jury's collective opinion that it cannot reach a verdict; (3) the length of the jury deliberations; (4) the length of the trial; (5) the complexity of the issues presented to the jury; (6) any proper communication which the judge has with the jury; (7) the effects of possible exhaustion and the impact which coercion of further deliberations might have on the verdict; and (8) the trial judge's belief that additional prosecutions will result in continued hung juries.

(Citations omitted). 732 F.2d at 56.

Applying the *Hogg* guidelines to the particular circumstances of the case at bar, it is apparent that the following factors collectively justified the trial judge's declaration of a mistrial: (1) this was only a three and

one-half day trial; (2) the issues were not particularly complex; (3) the jury had already deliberated for thirteen and one-half hours over a three-day period; (4) the jury had been given the following modified *Allen* charge:

> If you decide that you cannot agree and that further deliberations will serve no useful purpose, you may ask to be returned to the courtroom and report that fact to the Court. *If there is a possibility of reaching a verdict, you should continue your deliberations.*

(Emphasis supplied); (5) petitioner did not object to the *Allen* charge; (6) the jury deliberated a total of nearly four more hours after receiving the *Allen* charge; (7) the jury subsequently notified the court that it was unable to reach agreement on either count; (8) petitioner's counsel agreed with the court that the jury was hung.

Moreover, after receiving the jury's communication that they could not reach an agreement, the trial judge called the entire jury back into open court and asked the foreman whether they were, in fact, deadlocked. The foreman answered that they were, and no other juror expressed any disagreement, objection or discomfort with the foreman's assessment. Thus, the circumstances indicated that the foreman was speaking for the entire jury in his representative capacity, and the trial judge, who was in a position to observe the demeanor and expressions of the other jurors was justified in so concluding. *See United States v. Larry*, 536 F.2d 1149, 1153 (6th Cir. 1976), *cert. denied*, 429 U.S. 984 (1976).

Petitioner's blanket statement, at page 9 of his Petition in this matter, that considerable conflict and uncertainty exists "among the circuits on the proper stan-

dard for determining when, or if, a jury is genuinely deadlocked" is totally unsupported in law.

First, only two of the cases cited involved the declaration of a hung jury following an *Allen* charge, and both are distinguishable on their facts from a case such as the one at bar, where, after being specifically told to continue their deliberations if the *possibility* of reaching a verdict existed, the jury, following four (4) more hours of deliberation, on its own initiative, informs the court that it cannot agree on either count.

Second, the other authorities to which petitioner cites demonstrate no conflict among the circuits with regard to the ultimate issue: ascertaining the *possibility* of reaching a verdict through questions to the jury, either directly or through its foreman, where no *Allen* charge has been given prior to such questioning.

Among the cases cited by petitioner as supportive of his ill-founded conclusion that confusion reigns with regard to the proper standard for determining if, and when, a jury is genuinely deadlocked, only *United States v. Horn,* 583 F.2d 1124 (10th Cir. 1978), and *United States v. Lansdown,* 460 F.2d 164 (4th Cir. 1972), involve the giving of an *Allen* charge prior to declaration of a mistrial.

The *Horn* court found that the mistrial declared in that case was improper because it had been declared *sua sponte* by the district court without any further communication from the jury regarding the *possibility* of its reaching a verdict.

Similarly, the *Lansdown* court reversed the district court's denial of defendant's motion to dismiss on double

jeopardy grounds because that court had *sua sponte* declared a mistrial *despite* communications from the jury foreman that there remained a distinct *possibility* that the jury would reach a verdict if allowed to deliberate further.

Both of these cases are clearly distinguishable from the case at bar, where the trial court took much more care in determining whether the *possibility* of reaching a verdict existed prior to declaring a mistrial. The jury was instructed to continue its deliberations as long as the *possibility* of reaching a verdict remained. Thereafter, the jury, through its foreman, notified the court that it could not reach an agreement on either count. In view of all of the circumstances that preceded that communication to the court, the court was clearly justified in declaring a mistrial on the grounds that the jury was *hopelessly deadlocked.* And, as the court stated in *United States v. See, supra,* "the 'crucial factor' in determining the probability of agreement is a statement from the jury that it is 'hopelessly deadlocked'." 505 F.2d at 851 (quoting *United States v. Lansdown, supra* at 170).

Petitioner next asserts that since the trial court knew of the jury's unannounced "verdict" on Friday, the court had strong evidence that the jury was not truly hung, and thus, should have made further inquiry as to the jury's activity on Friday. This argument is deficient in several respects.

First of all, the only evidence the trial court had before it on Monday was that the jury had deliberated for thirteen and one half (13½) hours over three (3) days and reported that they could not reach an agreement on either count. The "agreement" on Count One

had been reached on Friday. After the reporting of this "agreement" and the resulting occurrences, the jury returned to deliberations on Friday. They were then excused for the weekend and resumed deliberations on Monday morning. So, sometime between 4:00 p.m. Friday and 11:45 a.m. Monday, as a result of the deliberations process and the passage of time, the agreement on Count One dissipated, and the jury found itself unable to agree on either count.

Jurors can and do change their minds. The trial judge was not required to speculate as to how many jurors had changed their minds, or on the deliberations process. All that he was required to do was act on the only objective evidence he had before him—the length of the deliberations and the jury's statement that they could not agree. The trial court concluded that the jury was deadlocked and dismissed them. This decision was supported by the surrounding circumstances and was clearly within the court's discretion.

The fact that the jury may have reached a tentative agreement on one count of the two-count indictment does not impose any duty on the trial court to make any inquiries, since the jury instructions clearly stated to the jury that they were not required to agree on a verdict *on each* of the counts.

The jury instructions made it clear that the two (2) counts in the indictment were separate and distinct and that a finding on one count should not influence their finding on the other count.

It is clear, therefore, that any tentative agreement which was not put into writing by the jurors, was not binding on any juror, the court, nor the prosecution. This

standard was concisely set out in *McKay v. Raines,* 405 F. Supp. 363 (1975). In *McKay,* the defendant sought to introduce jury affidavits to show that the jurors had reached a tentative agreement as to one of the counts in the multi-count indictment where the original trial resulted in a hung jury. The court made it quite clear that a jury's decision is not final until it is presented to the court, has been accepted by it, and has been assented to by the jury.

> Until such time jurors are not bound by votes or decisions in the jury room and remain free to register dissent up to the time the verdict is *recorded.* Deliberations not having been completed, no jeopardy attached which would bar a second prosecution should a mistrial be declared. . . . the affidavits themselves indicate that the jury merely made a *preliminary determination* of the second degree murder charge in the course of its discussion. *This was not binding on any juror, the court, nor the prosecution.*

(Emphasis added). *Id.* at 365.

Thus, the jury in this case was instructed that they were to consider each count separately and come to a verdict on each, in writing, before announcing it in open court. The jury did not ask for any clarification or further instructions on this matter, and upon returning from deliberations, they announced that they could not reach an agreement on either count. Under these circumstances, the judge was not obligated to make any further instructions, nor was he authorized to make any inquiries of the jury regarding its failure to agree.

In *Smith v. Commonwealth,* 321 S.W.2d 786 (Ky. Ct. App. 1959), the court cautioned against the possible dangers of a trial judge improperly influencing an apparently dead-

locked jury by what he says to them. The court stated that:

> [i]t behooves a trial judge to be most careful in what he says to a jury when it appears that body may be hung and he seeks to have them reach a verdict. . . A presiding judge should never inquire, or let the jury inform him, how it stands when it is apparently hung. *Id.* at 789.

Similarly, in *State v. Middleton*, 63 S.E.2d 163 (S.C. 1951), the court found that a trial judge had committed prejudicial error in inquiring about the jury's standing. Again, wary of the possibility of the trial judge improperly influencing the jury, the court found that "it is improper [for the trial judge] to make the jury publicly reveal their standing in regard to the conviction or acquittal of the accused." *Id.* at 165.

Despite the suspicion and disfavor with which a trial judge's inquiries of a hung jury are viewed, petitioner contends that the trial judge acted improperly in not inquiring if a verdict on the first count had been reached on Friday. Clearly, though, given the fact that the jury had reported it was deadlocked, and given the judicial admonitions against such questioning, the court should not and could not have made such inquiries. It is also evident that because the court had instructed the jury to consider each count separately, and because there is no evidence that the jury expressed any confusion to the court, an additional instruction regarding a partial verdict was not required.

The jury's declaration that no agreement had been reached on either count, and their failure to reach any type of true verdict, were the only facts before the trial

judge when the decision to discharge the jury was made. Because the jury, by its own admission, could not reach an agreement after considerable deliberation, the court did not act improperly in discharging them and declaring a mistrial.

Thus, there was a substantial amount of supporting evidence on which the trial judge could have based his decision to exercise his discretion in dismissing the jury. The Sixth Circuit Court of Appeals reviewed these factors and affirmed that the trial court had not abused its discretion. The State submits that, under the circumstances here, this is the only possible conclusion.

This case does not present the type of close question which merits the attention of this court. Nor does this case represent the type of case which can be used to create judicial standards for future decisions. Determinations such as this must be made on a case by case basis, because whether the trial court acted properly depends on the facts and circumstances peculiar to each case. As such, it would be "impossible to define all the circumstances which would render it proper to interfere." *See,* at 850.

Since it would be impossible to define all of these circumstances, it would be equally impossible to set out an abstract formula which could be mechanically applied in each and every case. *See,* at 851. The best that can be done is to set out general guidelines, and factors or circumstances which might be considered in determining whether a mistrial is necessitated. The general guidelines, however, have already been set out by the United States Supreme Court in *Arizona v. Washington, supra,* and have been followed in the other cases to which petitioner cites. Likewise, relevant factors or circumstances have also been

established, e.g., length of deliberations, failure to object, jury's statement that it is hung, by numerous decisions, including those cited herein.

Because there is ample evidence pointing to the conclusion that there was no abuse of discretion in the case at bar, and because the exact circumstances present here will never be repeated, this case does not represent the type of case which could be used as a vehicle for the formation of constitutional principles to be applied in future cases. As such, this case is not of the type which merits this court's review.

In addition, a finding that the trial judge in this case abused his discretion would serve to defeat the ends of justice. In reviewing a trial judge's decision to declare a mistrial, it is important to realize that:

> [t]he trial judge must balance the defendant's 'valued right to have his trial completed by a particular tribunal,' with Society's interest in just judgments and the conservation of judicial resources.

See, at 851 [quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)]. As a result of this balancing process:

> A defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.

Wade, at 689.

Not only are society's interests often protected by dismissal of a deadlocked jury, but the defendant's interests are also served by this action in many cases. *See*, at 851.

> Requiring a jury to continue deliberations despite genuine and irreconcilable disagreement more often than not defeats the ends of public justice; not only will such compulsion needlessly waste valuable judicial resources, it may coerce erroneous verdicts.

United States v. Goldstein, 479 F.2d 1068 (2nd Cir. 1973).

Because of these considerations then, the decision of the trial judge, when supported by relevant evidence, should not be set aside. Doing so would cause trial judges to feel obligated to pressure juries into deliberating until a verdict is reached, even where, as here, a jury states that they are unable to reach an agreement after many hours of deliberations, the trial judge ascertains that this is in fact the case, and the defendant concurs in this assessment. Hence, the overturning of a trial judge's amply supported, discretional decision, as is present here, would only defeat the public's, as well as, the defendant's interest in "fair trials designed to end in just judgments." *Wade,* at 689.

The State, therefore, respectfully submits that petitioner's demand for Writ of Certiorari in this matter must be denied.

CONCLUSION

Under the circumstances present in the case at bar, the trial court clearly exercised sound discretion in finding the jury deadlocked, and in then declaring a mistrial. As the United States Supreme Court stated in *Gori v. United States,* 367 U.S. 364 (1961):

> Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such

> a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment.

Id. at 368.

In view of this holding as well as the other holdings cited herein, the State would finally submit that a barring of the re-trial of petitioner in this matter would be to "deny the state its right to one full and fair opportunity to convict those who have violated its laws. *Arizona v. Washington,* 434 U.S. 497, 509 (1978)." *Ohio v. Johnson,* 467 U.S. 493, 502 (1984).

For all of the foregoing reasons then, respondent respectfully requests that this Honorable Court deny petitioner's demand for Writ of Certiorari.

Respectfully submitted,

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